Report and Recommendations

JUDICIAL
SELECTION PROCESS
REVIEW
COMMITTEE

Alberta Justice Communications

3rd floor, Bowker Building
9833 - 109 Street
Edmonton, Alberta
T5K 2E8

Tel: 403/427-8530

Fax: 403/422-7363

ISBN: 0773251650

May 1998

TABLE OF CONTENTS

PART I SUMMARY OF REPORT

1. Executive Summary

This is the Report of the Judicial Selection Process Review Committee which was established by the Minister of Justice and Attorney General to review the process for the selection of judges for the Provincial Court of Alberta and to identify alternative mechanisms that could be used.

1.1 Present judicial selection process

The present judicial selection process for judges of the Provincial Court includes the following steps:

1. The Department of Justice refers applications for appointment to the Provincial Court to the Judicial Council, which is composed of three judges and the President of the Law Society. The Provincial Court Judges Act provides for the appointment of two other persons by the Minister of Justice, but these appointments have not been made for the past few years because of doubts raised by a judicial decision about the propriety of involving non-judges in the Judicial Council's disciplinary function;
2. The Judicial Council decides whether or not to recommend each applicant for appointment. If the recommendation is favourable, the applicant's name is put onto a floating list;
3. When an appointment is to be made, the Lieutenant Governor in Council, on the recommendation of the Minister of Justice, makes the appointment from the list approved by the Judicial Council.

The Judicial Council receives an application form which has a good deal of personal and professional information about the applicant, and it interviews applicants. It tends to recommend for appointment any lawyer with at least 10 years of experience who is at least 40 years of age unless the applicant has a criminal record, a record of ethical infractions, or an undue number of claims for substandard legal work.

1.2 Recommended judicial selection process

The Committee's view is that the judicial selection process should increase the level of public involvement and should be directed toward finding the best possible appointees rather than merely screening out those who should not be appointed. Its principal recommendation is therefore that the judicial selection process should be as follows:

1. A Provincial Court Nominating Committee should be substituted for the Judicial Council in the selection process. The PCNC should include four judges and lawyers and four non-lawyers appointed by the Minister of Justice to achieve the maximum practicable gender, ethnic and geographic diversity.

2. The Provincial Court Nominating Committee should advertise each judicial vacancy, obtain and check personal and professional information about each applicant, and recommend a short list for appointment from which the Lieutenant Governor in Council would be obliged to make the appointment. The short list should include six names where practicable and should not be less than three names.

With some minor adjustments, this procedure would apply to the appointments of the Chief Judge and Assistant Chief Judges.

The selection process the Committee recommends would leave the ultimate responsibility for the appointment of Provincial Court judges with the Lieutenant Governor in Council. It would, however, involve the public in the process through the four members appointed by the Minister of Justice and would give the public an assurance that the process was designed to obtain the best possible judges. The Committee also recommends that the Chief Judge and Assistant Chief Judges of the Court be appointed for fixed non-renewable terms of seven years and five years respectively.

1.3 Procedures considered and not recommended

The Committee has considered whether or not Provincial Court judges should be appointed for fixed terms, either renewable or non-renewable, instead of being appointed to the retirement age of 70 as they are at present. The Committee's conclusion is that judges should continue to be appointed to retirement age, though the existing retirement age of 70 might be reviewed by an appropriate body, retirement age being an issue on which the Committee does not have sufficient information to make a recommendation.

A system of renewable fixed-term appointments would be intended to achieve judicial accountability. However such a system would exert pressure on Provincial Court judges who want to be reappointed to make decisions that will satisfy the reappointment authority, whether that is the Government or an independent committee, rather than decisions based solely on the cases before the Court. In the Committee's opinion that would be destructive of the right of every person who appears before the Court to have a fair trial before an impartial judge. The Committee therefore recommends against renewable fixed-term appointments for regular full-time judges.

A system of non-renewable fixed-term appointments would not achieve judicial accountability. It would remove judges without reference to their capabilities and thus would remove judges who have benefited from their judicial experience. The

Committee thinks it likely that many good candidates for judicial appointment would not apply for appointments for fixed terms after which they would have to find other employment, and there is at least some risk that judges who would be looking for employment after the expiration of their terms would, or would be perceived to, favour law firms and business enterprises who may provide such employment. The Committee therefore recommends against non-renewable fixed-term appointments.

The Committee recommends against a system of elections. Elected judges would be under pressure to make decisions that will get votes.

The Committee has considered whether US-style confirmation hearings should be held in a political forum on appointments of Provincial Court judges. The Committee has also considered whether the PCNC should interview candidates publicly. The Committee recommends against any such procedure. Confirmation hearings are likely to become political circuses. PCNC public interviews are likely to inhibit good candidates from applying and will serve no useful purpose in the Alberta Provincial Court context.

1.4 Qualifications and criteria for appointment to the Provincial Court

The Committee decided against recommending lay appointments to the Provincial Court. The powers of the Court include dealing with very serious criminal charges and civil claims up to $7500. The complexity of society and the laws which regulate society, including the Charter means that a Provincial Court judge must have an understanding of law, legal process and the laws of evidence, and the judicial function. Formal legal training and legal experience are, in the Committee's opinion, a minimum basis for an expectation that a prospective appointee as a Provincial Court judge has this understanding.

The Committee recommends that the minimum qualification for appointment to the Provincial Court be 10 years' membership in good standing of the bar or bench in a Canadian province or territory.

The Committee also recommends that the Provincial Court Judges Act state that appointments to the Provincial Court are to be made on the grounds of merit, including integrity, professional excellence, community awareness and appropriate personal characteristics. Representativeness of the general population should be considered as a factor but should not detract from the overall requirement of merit.

As these proposals are necessarily very general, the Committee suggests that the PCNC should give consideration to formulating and issuing criteria which it will apply in selecting the names for its short lists, and suggests that the list developed by the Ontario Judicial Appointments Advisory Committee would be a good starting point.

1.5 Supernumerary judges

Under Alberta Bill 25 of 1998, the Lieutenant Governor in Council can appoint retired judges of the Provincial Court for two-year renewable terms to serve when called upon by the Chief Judge, receiving payment only for time actually worked. All appointments will have to be made on the recommendation of the Chief Judge. The Lieutenant Governor in Council will be able to reject the Chief Judge's recommendation for the initial appointment of a supernumerary judge but not later recommendations for the reappointment of the supernumerary judge to a second or subsequent term. The Committee thinks that this is a good process which enables the Provincial Court to operate more efficiently and economically.

1.6 Conclusion

The Committee's opinion is that the present system of appointments to the Provincial Court has served Alberta well but requires the important changes suggested in this Report in order to improve the openness of the judicial selection process, provide for increased public participation, and give a greater assurance that appointments will be made on grounds of merit only.

2. List of Recommendations

Recommendation 1

The Committee recommends against the election of judges to the Provincial Court.

Recommendation 2

The Committee recommends

(1) That a nominating body be established

(a) to advertise existing or impending judicial vacancies on the Provincial Court; to actively seek out the most qualified candidates for each vacancy based on criteria which are specified and made public; to obtain all necessary information about all candidates; and to interview those whose names are to be put forward for appointment;

(b) to recommend to the Minister of Justice a short list of names of the most qualified candidates for appointment for each vacancy.

(2) That the short list include six names wherever practicable, and not less than three names in any event.

(3) That the nominating body

(a) not be the body which investigates complaints against Provincial Court Judges,

(b) include

(i) representatives from the bench and bar, and

(ii) a strong element of non-lawyers chosen to represent various segments of society, which should be 50 per cent of the membership of the nominating body, and

(c) issue an annual public report of its activities.

(4) That the Lieutenant Governor in Council, on the recommendation of the Minister of Justice, be required to appoint one of the candidates on the short list to fill the vacancy.

Recommendation 3

The Committee recommends that the procedure outlined in Recommendation 2 be followed in the appointment of the Chief Judge and Assistant Chief Judges.

Recommendation 4

The Committee recommends against public interviews or confirmation hearings on appointments of Provincial Court judges.

Recommendation 5

The Committee recommends

(1) That the nominating body (which is referred to for convenience as the "Provincial Court Nominating Committee" or "PCNC") should be composed of the following members:

1. The Chief Justice of the Court of Queen's Bench of Alberta or his or her designate;

2. The Chief Judge of the Provincial Court or his or her designate;

3. The President of the Provincial Court Judges Association or his or her designate;

4. The President of the Law Society of Alberta or his or her designate;

5. Four members who are not lawyers, appointed by the Minister of Justice, chosen so as to best achieve gender, ethnic and geographical diversity. The Minister should also be authorized to appoint two alternate members to attend and participate in proceedings of the PCNC in substitution for any of the 4 members who are unable to attend.

(2) That the PCNC be at liberty to make its own rules of procedure and designate one of its members as chair.

Recommendation 6

The Committee recommends

(1) That the four non-lawyer members and two alternate non-lawyer members of the PCNC appointed by the Minister be appointed for three year terms, with power to appoint members for shorter terms in order to maintain continuity.

(2) That an individual who has served a term as an alternate member be eligible for appointment as a full member.

(3) That the total time for which any person may serve as full or alternate member or both be two terms, or six years.

Recommendation 7

The Committee recommends

(1) That appointments to the Provincial Court be made on the grounds of merit, including factors such as integrity, professional excellence, community awareness, and appropriate personal characteristics.

(2) That representativeness of the general population be considered as a factor, though not so as to detract from the overall requirement of merit.

(3) That only persons with formal legal training and experience be appointed as Provincial Court judges.

(4) That the minimum legal requirement for appointment as a Provincial Court judge should be 10 years membership in good standing of the bar of a province or territory of Canada, with credit for time spent as a full-time judge.

(5) That no minimum age for appointment be prescribed.

(6) That no citizenship or residence requirement be prescribed.

(7) That the PCNC give consideration to formulating and issuing the criteria which it will apply in selecting names to go on its short list, the Ontario Judicial Appointments Advisory Committee's list which is summarized in this Report being, in the Committee's opinion, a good starting point.

Recommendation 8

The Committee recommends

(1) against fixed-term appointments of judges to the Provincial Court, whether renewable or non-renewable,

(2) that Provincial Court judges continue to be appointed to retirement age, and

(3) that the question of the retirement age of Provincial Court judges should be looked into by an appropriate body, though no reduction should take place unless adequate pension arrangements are made and any reduction should not apply to judges now sitting.

Recommendation 9

The Committee recommends

(1) That the Chief Judge and the Assistant Chief Judges be appointed to those offices for fixed terms.

(2) That the fixed terms be seven years for the Chief Judge and five years for Assistant Chief Judges.

(3) That the appointments be non-renewable;

(4) That upon the expiration of a fixed term, a retiring Chief Judge or Assistant Chief Judge should continue to be a judge of the Provincial Court.

(5) That the question whether a former Chief Judge or Assistant Chief Judge should receive a sitting judge's salary or a salary associated with their former office should be referred to the Compensation Commission established under Alberta Bill 25 of 1998.

Recommendation 10

The Committee recommends that supernumerary judges be appointed for two-year fixed terms renewable on the recommendation of the Chief Judge as set out in Alberta Bill 25 of 1998.

PART II REPORT AND RECOMMENDATIONS

1. The Judicial Selection Process Review Committee

1.1 Establishment and purpose of the Committee

The Judicial Selection Process Review Committee was established by Ministerial Order of the Hon. Jonathan N. Havelock, Q.C., Minister of Justice and Attorney General, dated January 21, which is Appendix A to this Report. The Co-Chairs of the Committee are Chief Judge Edward R. Wachowich and Marlene Graham, Q.C., MLA. The other members are Gordon Flynn Q.C. (President of the Law Society); Shirley Keith (Principal, Kennedale School); Jeffrey McCaig (CEO, Trimac Corporation); and Michael Procter (Mayor, Town of Peace River).

The Committee's Terms of Reference and specific issues referred to the Committee are set out in Appendix B. Generally speaking, the Committee is to review the present selection process for the judges of the Provincial Court, including the role of the Judicial Council in the selection process. The Committee is to consider alternatives, particularly non-renewable term appointments, and make recommendations. The Committee has been left entirely free to form its own independent conclusions about the subjects and issues included in the Terms of Reference, based on its own research and on the comments and suggestions which it has received.

The Committee is directed to report by May 31, 1998, on which date the appointments of the Co-Chairs and members will expire.

1.2 Proceedings of the Committee

At the beginning of its work, the Committee decided to obtain the views of Alberta individuals and organizations interested in or concerned about the subjects and issues which the Committee is to address. The Committee accordingly directed that letters go out to all individuals and organizations who might be expected to be interested. It also directed that advertisements be placed in the major daily newspapers in the Province. A copy of the advertisement is Appendix C.

The Committee received comments and suggestions from 46 individuals and organizations. The organizations are listed in Appendix D. Individuals have not been named due to the Freedom of Information and Protection of Privacy Act.

These comments and suggestions have given the Committee much useful advice and guidance in its deliberations, and the Committee is grateful to those who took the time to respond to the Committee's request for input.

In addition to reviewing submissions, the Committee has reviewed legislation and literature on the subject of judicial appointments in order to compare the selection processes of Alberta with those of other provinces and countries and to better understand the advantages and disadvantage of different kinds of selection processes. After extensive and full discussion, it has reached the conclusions set out in this report.

2. The Present Appointment Process

2.1 Legislative authority

Bill 25 was enacted at the recent session of the Legislature. When the relevant parts are brought into force, Bill 25 will make some important changes in the legislation governing the appointment, remuneration and discipline of Provincial Court judges. As all of Bill 25 is likely to be brought into force at an early date, this Report will describe the law as it will be under Bill 25 but will point out any changes made by Bill 25 which are material to the discussion.

The legislative authority for the appointment of judges to the Provincial Court is found in sec. 2 of the Provincial Court Judges Act. Sec. 2(1) provides that the Lieutenant Governor in Council may appoint the judges. Sec. 2(2) provides that only Canadian citizens may be appointed. In addition, however, the Judicial Council considers the names of all applicants for appointment and reports its recommendations to the Minister of Justice and Attorney General.[1]

The Judicial Council consists of

(a) the Chief Justice of Alberta, the Chief Justice of the Court of Queen's Bench and the Chief Judge of the Provincial Court, or their designates;

(b) the President of the Law Society of Alberta or his or her designate;

(c) not more than two other persons appointed by the Minister.

In recent years, the Minister has not appointed "other persons" to the Judicial Council. At least since 1994, this is because doubts were raised by a court decision[2] about the constitutional permissibility of having persons other than judges participate in a process which may lead to the removal of Provincial Court judges.

2.2 Term of appointments and security of tenure

The Provincial Court Judges Act provides that Provincial Court judges

(a) must retire at the age of 70; and

(b) cannot be removed from office before reaching that age except on the recommendation of the Judicial Council following a hearing.

Essentially, Provincial Court judges' appointments continue until they reach the retirement age of 70 years unless they resign or are removed for disability or wrongful conduct.

---

[1] Under Bill 25, the Judicial Council will be established under sec. 32.2 of the Judicature Act and will receive its authority from sec. 32.21.

[2] R. v. Campbell (1994) 160 AR 81 (Alta QB, Justice D.C. McDonald).

2.3 Required qualifications

The only qualification required by the Provincial Court Judges Act is Canadian citizenship. However, at least since 1973, only persons who are qualified as lawyers have been appointed. It is still the policy of the Judicial Council to recommend the appointment only of persons who have legal training. The Council, as a rule of thumb, requires that appointees have engaged in the practise of law for 10 years and have attained the age of 40 years, though there is some flexibility in the application of the rule.

2.4 Procedure

The procedure on the appointment of Provincial Court judges is as follows:

1. A person who wishes to be appointed files an application with Alberta Justice. This contains a good deal of information of a personal, professional and community-involvement nature.

2. Alberta Justice refers the application to the Judicial Council.

3. The Judicial Council:

(a) checks for criminal records, records of disciplinary proceedings before the Law Society and records of civil claims brought against the appointee for negligent or intentional departures from professional standards;

(b) interviews the appointee; and

(c) makes a recommendation for or against the appointment of the applicant as a Provincial Court judge.

Generally speaking, the Judicial Council recommends the appointment of any qualified lawyer of 10 years standing at the bar and 40 years of age unless there is a specific reason not to make such a recommendation. Such reasons include a criminal record, ethical infractions, and a number of civil claims for negligent or intentional departures from professional standards. Occasionally, the Judicial Council will form an adverse judgment as to an applicant's suitability on professional or personal grounds.

4. If the recommendation is favourable, the applicant's name is added to a pool of names available for appointment. There are approximately 150 names in the pool.

5. When an appointment is to be made, the Minister recommends a name for appointment to the Lieutenant Governor in Council, who makes the appointment. In practice the Minister makes recommendations for appointments

from the pool of names of those who have been recommended for appointment by the Judicial Council, but the criteria which the Minister uses in making the recommendations are not made public.

2.5 Criteria applied by the Minister and Lieutenant Governor in Council

As there is no requirement that the Minister or the Lieutenant Governor in Council give reasons for appointing one person as a Provincial Court judge and declining to appoint another, there is no specific barrier against political influence being a factor in such appointments and no way for the public to know whether such influence is a factor or, if it is, the degree of its importance. This has been a sore point over many years in Alberta and throughout Canada. It is occasionally referred to in the media and is often referred to in discussions about the courts.

3. Context of the Discussion

3.1 The Court system

There are two courts in the province which adjudicate criminal charges and disputes under the civil law: the Court of Queen's Bench of Alberta and the Provincial Court of Alberta. The Court of Appeal of Alberta hears appeals from both and can set aside decisions which it thinks are wrong. A further appeal can go from the Court of Appeal to the Supreme Court of Canada. These are few in number but are often influential in effect.

The Queen's Bench is considered to be the senior Alberta trial court. It can hear any case, and in some cases it hears appeals from the Provincial Court. However, the Provincial Court has very broad powers and, in fact, deals with by far the greatest number of criminal charges, including very serious charges.

Justices of the peace are also judicial officers. They exercise significant powers in such matters as bail and search warrants. Others, who are called Commissioners, deal with a large number of offences against provincial statutes. Although supervised by the Provincial Court, justices of the peace are covered by separate legislation and are not within the Committee's Terms of Reference.

3.2 Structure and powers of the Provincial Court

The Provincial Court has four divisions:

1. The Criminal Division. The judges of the Criminal Division deal with criminal charges ranging from comparatively minor to very serious, which include the great bulk of charges that come to the courts. They also hold preliminary inquiries to determine whether there is enough evidence to send other serious charges to the Queen's Bench for trial. They do not deal with jury trials.
2. The Family Division. Under provincial legislation, the judges of the Family Division deal with guardianship of children and sometimes paternity, with child custody, with child and spousal financial support, and with child welfare matters.
3. The Youth Division. The Family Division judges are also the Youth Division judges. As such, they exercise jurisdiction under the provincial and federal Young Offenders Acts.
4. The Civil Division. Judges of the Civil Division decide claims up to $7500, though with some exclusions such as claims dealing with title to real property.

All decisions of the Provincial Court can be appealed either to the Court of Queen's Bench or to the Court of Appeal.

3.3 Scope for the Committee's recommendations

The scope of effectiveness of the Committee's recommendations is subject to the following limitations:

1. The Committee's recommendations can affect only the selection process for the judges of the Provincial Court of Alberta. The Province does not appoint judges to the Court of Queen's Bench, the Alberta Court of Appeal or Supreme Court of Canada. (The Province does appoint justices of the peace, but, as noted above, they are not within the Committee's Terms of Reference.)

2. The Committee's Terms of Reference do not include making recommendations for the accountability of Provincial Court judges for their performance (though some of the proposals which the Committee has considered and decided against as set out later in this Report would have "accountability" implications, e.g., proposals for renewable term appointments and judicial elections).

3. The choice of Provincial Court judges is limited in its effect because whoever is appointed to the Court must apply laws which are largely outside the control of the Court. On the criminal side, including offences against provincial statutes, the laws are mostly laid down by statutes enacted by elected legislators, and the place to change them is in Parliament and the Legislature. Much of the civil law is also laid down by statute. The law which is not statutory, both civil and criminal, is mostly laid down by appellate courts rather than the Provincial Court. While there are some areas, such as sentencing, which leave much to judicial discretion, even there the Provincial Court is often bound by guidelines from judicial decisions in the Queen's Bench and at appellate levels and must act within limits prescribed by the legislation under which it operates. Any change in the method of appointment of Provincial Court judges will not change the law which the Court must administer.

4. Similarly, while the Provincial Court is involved in the interpretation of the Canadian Charter of Rights and Freedoms, the high-profile controversial court decisions that shape the application of the Charter are mostly decisions of the Court of Appeal or the Supreme Court of Canada.

5. There are constitutional limitations on what the Province can do, whatever the Committee recommends. One important limitation is contained in sec. 11(d) of the Charter, which provides that everyone who is charged with an offence is presumed innocent until convicted by "an independent and impartial tribunal." If the Province does something that makes the Provincial Court less than "independent and impartial," it will mean that the Court cannot function on the criminal side.

4. The Committee's Approach to the Judicial Selection Process

4.1 Objectives of the selection process

The judicial selection process should have the following objectives:

(a) to bring about the appointment of the persons best qualified to do justice according to law;

(b) to maintain public confidence in the courts by assuring the public that the best available candidates are appointed; and

(c) without detracting from making appointments on merit, to make the Court more representative of the general population.

4.2 Judicial independence vs. judicial accountability

Judicial independence and judicial accountability are two broad themes which the Committee has had very much in mind. They also appear in the comments and suggestions the Committee has received. They inevitably appear in any discussion of courts and how they should be structured.

The first theme is that everyone who comes before a court is entitled to an impartial judge, that is, a judge who will decide the facts of the case impartially and apply the law impartially to those facts. A judge should not favour the Crown over an accused person or vice versa, nor should a judge favour one party to a dispute over another, except to give them their rights according to law. In order to ensure that a judge is impartial, the judge must be independent, that is, there should be no external pressure on judges which might cause them to favour one side over the other.

Judicial independence is not for the benefit of judges. It is for the protection of those whose rights judges determine. Because that protection is so fundamental for every member of society, the tradition of judicial independence is very strong in Canada.

The second theme is that of judicial accountability. If judges exercise judicial powers in inappropriate ways, there should be some way of correcting them. This is clearly so if a judge's conduct is corrupt or involves a clear dereliction of duty or if the judge is clearly unable to perform judicial functions. But some of the submissions the Committee has received would go further and say that it should be possible to correct the actions of judges whose decisions are seen to be inconsistent with the values of the majority or even of a specific group.

The two themes of judicial "independence" and judicial "accountability" clash with each other. If there is no control over judges, they are not "accountable." If judges must be "accountable" to someone, that someone has control over them and they are not "independent."

One form of "accountability" is the system of appeals. Courts that hear appeals can correct mistakes of judges whose decisions are appealed. They can make adverse comments on the actions and decisions of those judges. However, they cannot call judges personally to account, and those who consider that there is a failure of judicial accountability may not be satisfied with appeals which merely go to other judges.

Another form of accountability is the complaints procedure which is set out in sec. 32.3 of the Judicature Act, which is added by Alberta Bill 25 of 1998. Under this procedure, a Provincial Court judge can be removed from office only on the recommendation of the Judicial Council after a judicial inquiry, and lesser sanctions can be imposed by the Judicial Council or the Chief Judge. Removal under this procedure is not, however, based on an assessment of the correctness of a judge's decisions, or on the conformity of a judge's decisions with a particular set of values, and the procedure therefore does not satisfy everyone.

In formulating its proposals, the Committee has been very conscious of this tension between judicial independence and judicial accountability.

4.3 Representativeness

The Committee's information is that, of the 103 Provincial Court judges, including the Chief Judge and the Assistant Chief Judges, 89 are men and 14 are women. Two have Aboriginal ancestry. One is a member of a visible minority. These numbers disclose an under representation of women, Aboriginals and visible minorities.

5. Judicial Selection Models Reviewed by the Committee

In Canada, judges are appointed by the "Executive," that is, by the executive arm of government. The "Executive" for this purpose may be a Minister, or it may be the federal cabinet functioning as the Governor General in Council, or the Alberta cabinet functioning as the Lieutenant Governor in Council.

We will now list a number of models of judicial selection processes which the Committee has considered. The first three "Executive Appointment Models" have been or are being used in Canada. The other models are used in the United States.

Executive Appointment Models

Model	Description	Notes
1.Unlimited Executive discretion	1.The Executive appoints judges. 2.The Executive may consult anyone it wishes to consult but is not required to consult anyone.	Unlimited Executive discretion was the federal model until 1968 (when a Canadian Bar Association screening body was instituted) and the provincial model for some time after that.
2. Unlimited Executive discretion with screening body	1. The Executive appoints judges. 2. The Executive receives advice from a screening body , limited to a statement that a candidate is or is not "recommended" or "qualified," and keeps an ongoing list of recommended candidates. 3. When a vacancy occurs, the Executive may (or may not) agree not to appoint a candidate who is "not recommended" by the screening body.	1.This is the present system for Canadian federal appointments and Alberta Provincial Court judge appointments. 2. Provincial advisory committees screen candidates for federal appointments. The Judicial Council screens candidates for Provincial Court judicial appointments. 3. In practice, screening standards are not rigorous. 4. Criteria for appointment and the screening body's advice are not necessarily made public.
3. Limited Executive discretion with nominating body	1. The Executive appoints the judges. 2. A nominating body searches for the best candidates for a specific vacancy and submits a short list of recommended candidates. 3. The Executive is obliged (by law or agreement) to appoint one of the short list (sometimes with right to refuse the whole list and ask for another list).	1. Ontario, Manitoba and Prince Edward Island have such systems. 2. The nominating body does the initial ranking and restricts the Executive's choice. 3. Criteria and process are likely to be more public and can be required to be public.

Model	Description	Notes
4. Executive discretion subject to confirmation hearing	1. The Executive appoints the judges. 2. However, the appointment is subject to confirmation by a legislative body, after a hearing.	This is the system at the United States federal level.
Election Models		
1. Election of judges for fixed terms	1. Though many states have switched over to "merit selection" the voters in several US states elect judges for fixed renewable terms. 2. Elections may be partisan-political (i.e., judges run on party slates) or nonpartisan (i.e., candidates are chosen for the list by primaries or nominating conventions).	Criteria for election are whatever criteria voters choose to apply.
2. "Merit selection"	"Merit selection" combines "Limited Executive discretion with nominating body" and a system of elections. It involves the following: (1) The state Governor appoints a judge for a fixed term or for the balance of a fixed term from a short list supplied by nominating commission. (2) At the end of the fixed term, the judge must run in a "retention election" in which sole question for the voters is whether the judge should be retained for another term.	1. The "merit selection" system is intended to correct or alleviate the perceived flaws of election systems. It was developed by an American lawyers' group called the American Judicature Society and is now used by approximately 2/3 of the American States. 2. The "retention election" gives voters a chance to eject judges whose views they don't like, while not involving judges in contested elections, partisan-political or otherwise. 3. It is said that "retention elections" do not screen out many judges who have been appointed under "merit selection."

In some European countries such as France, prospective judges are educated and trained in a stream separate from prospective lawyers, that is, prospective judges are identified at the beginning of their professional lives. That system of judicial selection has been designed to fit into an inquisitorial judicial system which is very different from the Alberta judicial system and the Committee does not think that it would be appropriate here.

6. Choice of Judicial Selection Process

6.1 Election of judges

A few of the submissions to the Committee propose that judges be elected. The reasons given by one submission, which probably reflect the opinions of the others, are that judges sometimes make law, and that they sometimes make law in ways that are inconsistent with majority values and views, and that the conduct of judges should be reviewable as a matter of democratic principle.

The Committee does not think that Provincial Court judges should be chosen by election or re-election. The Committee's reasons are as follows:

1. As the Committee has noted, it is essential for the protection of every citizen who is affected by Provincial Court proceedings, whether criminal or civil, that the judge be impartial, that is, that the judge will objectively decide what the facts are and will apply the law of the land to the facts. Every member of society is at risk if Provincial Court Judges make decisions for reasons other than the facts and the law in cases before them. It is entirely appropriate for elected representatives to make legislative decisions in order to get votes, but it would be quite wrong for judges to make judicial decisions to get votes.
2. A Provincial Court judge who must stand for re-election would want to get the necessary votes. The judge would therefore be under pressure to make decisions which would be likely to persuade voters to vote for them, or which would be likely to persuade contributors to contribute to their campaigns, or which be likely to persuade political parties to endorse their candidacy. Court decisions that take into account what will be likely to get a judge elected, rather than exclusively taking into account the evidence and the law of specific cases, would be bad decisions and would be destructive of legal protections which are fundamental to freedom.
3. An election process would be likely to discourage good candidates for judicial appointment, and would be likely to produce a less competent Court.
4. The cost of running another system of elections would not be justified, particularly as judicial elections would not fit in with other elections.

The Committee recognizes that judges are elected in many US states, but is not persuaded that the US systems of elections are better than the Canadian systems of appointments. A substantial majority of the states have backed away from contested elections. The "merit system," which involves "retention" elections, has corrected many of the problems of election systems, but still leaves open questions of judicial independence and impartiality. The Committee also notes that many of those who vote in judicial elections find themselves with little knowledge of the people for whom they are voting.

Recommendation 1

The Committee recommends against the election of judges to the Provincial Court.

6.2 Appointment of judges by the Executive from a short list provided by a nominating body

The Committee thinks that the ultimate responsibility for the judicial selection process must rest on a politically accountable authority. Provincial Court judges should therefore continue to be appointed by the Executive branch of the Government, that is, by the Lieutenant Governor in Council, who is accountable to the Legislature and, through the Legislature, to the public. The Committee thinks, however, that that degree of accountability is not enough. The selection process should be restructured to ensure that appointments are made on merit and should satisfy the public that merit is the basis of appointment. That is, the selection process should give an assurance that considerations other than merit, such as political affiliations, do not affect the appointment process.

Until comparatively recently, both federally and in the provinces, the judicial selection process has been totally left to the Executive with no control and no effective accountability. This situation, coupled with the fact that a high proportion of judges have been associated with the political party of the Governments which have appointed them, has almost invariably led to suspicions that political favouritism has been at work and that merit is not the first consideration. A judicial selection process which leaves the selection process entirely to the Executive, in the Committee's opinion, is wrong.

A significant improvement in the judicial selection process has been the establishment of "screening" bodies, both federally and in many of the provinces. These bodies consider applications for judicial appointment and decide either that each applicant is qualified for judicial appointment or that the applicant is not qualified, sometimes with a category of "highly qualified" or "highly recommended." The screening process involves obtaining a substantial amount of information from prospective appointees in a formalized way, which is itself a significant improvement on the system of unlimited Executive discretion. The members of the screening bodies usually include a number of judges and lawyers, with some non-lawyer representation.

As noted above, Alberta has such a screening body. It is the Judicial Council which, under Bill 25 of 1998, will now be established under sec. 32.2 of the Judicature Act, and which is also the body which investigates complaints against Provincial Court judges and can recommend removal. The Judicial Council has three judicial members, being the Chief Justice of Alberta, the Chief Justice of the

Queen's Bench and the Chief Judge of the Provincial Court or persons designated by them, plus the President of the Law Society of Alberta. As we have noted, the Act also provides for the appointment of two "other persons" by the Minister of Justice, but these appointments have not been made in recent years pending the resolution of doubts about the involvement of non-judges in the judicial disciplinary process.

It is the Judicial Council which effectively requires Provincial Court judges to be lawyers of 10 years' experience and 40 years of age, or nearly so. Apart from applying those criteria, the Judicial Council places approved applicants on a list of persons "recommended" for appointment, screening out those who have criminal or disciplinary records, an inordinate number of civil claims against them, and some who otherwise are inappropriate. When a vacancy arises the Minister of Justice customarily chooses one of the names on the list and recommends the appointment to the Cabinet.

The Committee thinks that the present judicial selection procedure for the Provincial Court is deficient for the following reasons:

1. It does not allow for adequate public input or information.
2. The "screening" process does not look for the best appointee. It merely screens out obviously inappropriate names, leaving the actual appointments to uncontrolled Executive discretion. It does not give any assurance that the Executive selection is based on merit and excludes political considerations.

In the Committee's view, the body which supervises disciplinary proceedings against Provincial Court judges should not also be the nominating body. For one thing, a body that has nominated a judge might be thought likely to be embarrassed to carry discipline proceedings through against that judge. More important, the two functions—the managerial function of searching for the best appointees, on the one hand, and, on the other hand, the semi-judicial function of investigating conduct and recommending for or against removal or the imposition of other sanctions—are different and, the Committee thinks, should be performed by two different bodies. The Committee therefore recommends that a separate nominating body be established. For convenience, this Report will call that body "the Provincial Court Nominating Committee" or "PCNC."

The function of the Provincial Court Nominating Committee will be to search out the best available candidates for every judicial appointment and to provide a short list of them to the Minister of Justice. The final decision about each appointment will be made by the Lieutenant Governor in Council on the recommendation of the Minister, but the short list procedure will ensure that every judge appointed by the Lieutenant Governor in Council appointee has been vetted for judicial merit and selected for appointment from the body of candidates.

There is a question as to how many names should be on the short lists. In Ontario,[3] the nominating committee provides "a ranked list of at least two names," and the Attorney General must recommend to the Lieutenant Governor in Council for appointment to the Provincial Court only a candidate who has been recommended for that vacancy. The Attorney General, however, can reject the Committee's recommendations and require it to provide a fresh list. In Manitoba,[4] a nominating committee constituted for a particular judicial vacancy is required to put forward a non-ranked list of three to six names from which the appointment must be made, though if a candidate named in the list is not willing or able to accept an appointment, the Minister of Justice may ask the nominating committee for a further recommendation.

In the Committee's opinion, the PCNC should be required to put forward a short list of six names, unless, for some reason, it is not practicable to do so, in which event the list should not be less than three names. The requirement of making an appointment from six names, in the Committee's opinion, will preserve flexibility and will avoid situations in which the Minister rejects the PCNC's list and asks for another one, with resulting delay, expense and inefficiency. The Committee also thinks that in the interest of flexibility, the names on the list should not be ranked. The PCNC procedure will, in the Committee's opinion, be a sufficient assurance that candidates appointed will be meritorious.

That leads the Committee to its specific proposal, which is designed to overcome the disadvantages of the present judicial selection process. It will put the proposal in the form of a recommendation.

---

[3] See Courts of Justice Act (Ont.) sec. 43.

[4] See Provincial Court Act (Man.) sec. 3.1.

Recommendation 2

The Committee recommends

(1) That a nominating body be established

(a) to advertise existing or impending judicial vacancies on the Provincial Court; to actively seek out the most qualified candidates for each vacancy based on criteria which are specified and made public; to obtain all necessary information about all candidates; and to interview those whose names are to be put forward for appointment;

(b) to recommend to the Minister of Justice and Attorney General a short list of names of the most qualified candidates for appointment to each vacancy.

(2) That the short list include six names wherever practicable, and not less than three names in any event.

(3) That the nominating body

(a) not be the body which investigates complaints against Provincial Court Judges,

(b) include

(i) representatives from the bench and bar, and

(ii) a strong element of non-lawyers chosen to represent various segments of society, which should be 50 per cent of the membership of the nominating body, and

(c) issue an annual public report of its activities.

(4) That the Lieutenant Governor in Council, on the recommendation of the Minister of Justice and Attorney General, be required to appoint one of the candidates on the short list to fill the vacancy.

Under this proposal,

(1) Every judicial vacancy on the Provincial Court will be publicized so that all qualified applicants will be aware of it.

(2) There will be substantial public input into the judicial selection process through the members of the nominating body.

(3) The criteria for appointment will be known to the public and will not include political affiliation (though creditable public service, including political activity for any political party or in municipal politics, may be seen as a positive qualification).

(4) The PCNC's annual report will add to the openness of the process.

6.3 Appointment of Chief Judges and Assistant Chief Judges

At present, the Chief Judge and the Assistant Chief Judges are appointed by the Lieutenant Governor in Council. The Judicial Council is not involved in the process, nor is any other person or body unless the Lieutenant Governor in Council or the Minister of Justice and Attorney General decides to consult them. The appointment is within the uncontrolled discretion of the Executive.

The Committee sees two disadvantages in this procedure. First, a Provincial Court judge who wants to become Chief Judge or Assistant Chief judge has a reason to make decisions that will be pleasing to the appointing authority, that is, the Minister and Cabinet. Second, the Minister or Lieutenant Governor in Council may decide to appoint a Chief Judge or Assistant Chief Judge who, they think, will not take the independent stance that the function requires.

For these reasons, the Committee thinks that, with any necessary changes, the procedure which the Committee has recommended for the appointment of Provincial Court judges should apply to the appointment of the Chief Judge and Assistant Chief Judges. That is, the Provincial Court Nominating Committee should put forward a short list of six names (or three names where it is impracticable to find six names) from which the Lieutenant Governor in Council will be required to make a choice.

All Provincial Court judges should be eligible for appointment as Chief Judge or an Assistant Chief Judge. However, the possibility of appointments from outside the court should not be ruled out, at least when there is likely to be a judicial vacancy on the court to which a candidate could be appointed to give him or her the necessary status for appointment as Chief Judge or Assistant Chief Judge. The PCNC should therefore be at liberty to go outside the court to find qualified candidates for these positions.

Recommendation 3

The Committee recommends that the procedure outlined in Recommendation 2 be followed in the appointment of the Chief Judge and Assistant Chief Judges.

6.4 Public hearings

Two submissions to the Committee suggest that public confirmation hearings should be held at which appointees would be questioned, apparently with the model of US Senate hearings on US Supreme Court judges in mind. Another submission suggests that the hearing might be by an all-party committee. The Committee does not think that hearings in a political forum would be a good idea. The US experience suggests that they are likely to become political circuses. If appointees give their views on subjects of interest to specific groups—whether

more fathers should get child custody, for example, or whether sentences should be tougher—they would be going some distance to prejudging cases without having the specific facts before them and without hearing both sides. We think that it is better for public input to be given through the mechanism of a nominating body.

In South Africa, the nominating body for the Constitutional Court and the superior courts, which is constituted along lines similar to those of the proposed Provincial Court Nominating Committee, conducts interviews in public of candidates for appointment. This would be preferable to confirmation hearings by a legislative body, and may be needed in South Africa because of the deep divisions between different elements in the population. Decisions of the Provincial Court in constitutional matters are not binding on other courts, and therefore do not have a widespread societal impact. Whatever may be said about the selection process for judges of the Supreme Court of Canada and the Courts of Appeal, the Committee does not think that similar public interviews would be useful or appropriate for Alberta at the Provincial Court level. Even if conducted by the nominating body, the publicity attached to the interviews is likely to inhibit good candidates and would not serve a useful purpose here. It should be noted also that the Minister has a public interest function in the appointment of judges and will be free to interview a prospective appointee if he or she thinks it desirable to do so.

Recommendation 4

The Committee recommends against public interviews or confirmation hearings on appointments of Provincial Court judges.

7. Composition and Procedures of the Nominating Body

7.1 Membership

Under Alberta Bill 25 of 1998, the Judicial Council, which is the Alberta screening body, is composed of the Chief Justices of the Court of Appeal and the Court of Queen's Bench and the Chief Judge of the Provincial Court or their designates, plus the President of the Law Society of Alberta or designate. Non-lawyer appointments to the Judicial Council have been kept in abeyance until doubts about the inclusion of non-judges in the judicial disciplinary process were resolved. That is, there is no member of the Judicial Council from outside the judiciary and the organized legal profession. In the Committee's opinion, this situation is not satisfactory because it does not provide for public input into the screening process or assure the public that the criteria for appointment are appropriate.

The addition of two properly selected members appointed by the Minister, if properly representative of the public, would do something to improve the present situation. More could be done by changing the function of the Judicial Council to that of a nominating body which seeks out the best qualified appointees and makes recommendations from which the Lieutenant Governor in Council must choose. However, in the Committee's opinion, these measures would still not do enough.

The Committee's opinion is that the judiciary and the legal profession should continue to have substantial representation on the Provincial Court Nominating Committee.

The members of the judiciary and the bar have the greatest exposure to practising lawyers and are therefore in a good position to assess the qualifications and standards of candidates for appointment to the Provincial Court and to form opinions about their likely performance if appointed. This is particularly true of the judges of both the Court of Queen's Bench and the Provincial Court itself. The Committee therefore thinks that the Chief Justice of the Court of Queen's Bench and the Chief Judge of the Provincial Court, or their designates, should be members of the PCNC. In addition, the President of the Association of Provincial Court Judges or his or her delegate can reflect the judicial experience of the other members of the Provincial Court and should be a member of the PCNC. The Committee thinks that the President of the Law Society or his or her designate should also be a member of the PCNC to reflect the views of the bar about candidates for appointment.

However, the judicial selection process cannot, in the Committee's opinion, be left to the judiciary/bar. There should be a non-lawyer component in the PCNC which is strong enough to ensure that other views are heard and to assure the public that the process is not a secret one controlled by the judiciary/bar.

There can be different opinions as to what relative strength the judiciary/bar component and the non-lawyer component should have, and it may be that the precise mix is not too important so long as each component is substantial. In Ontario, there are at least seven non-lawyers in a Judicial Appointments Advisory Committee of 13. In Manitoba, there are three non-lawyers in a nominating committee of seven members. In Prince Edward Island, there are two non-lawyer members in a Judicial Appointments Committee of five members.

It is, in the Committee's opinion, important that the balance between the professional and non-professional elements of the PCNC be as even as possible so as to ensure that the opinions and views of both elements will be fully considered. The Committee's opinion is therefore that the best mix is that the two components should be evenly balanced numerically. That is, the Committee's opinion is that half the members should come from the judiciary and the legal profession and half from the non-lawyer public. That is not to say that the Committee expects the members of the PCNC to vote according to where they come from. Rather, it expects that the judicial members, the lawyer members and the public members will come together, discuss applicants and how they fit agreed criteria, and come to reasoned conclusions which will respect the views of all members equally.

The question then arises: how are the non-lawyer members to be chosen so that they will truly represent the interests of the public? The Committee does not think that any system of elections is practical, and it does not think that a representative list should be made up by naming the holders of offices in public organizations. The Committee's view is that the non-lawyer members should be appointed by the Minister of Justice and Attorney General. In order to ensure representativeness, the Committee thinks that the Minister should be required to make appointments that will, to the extent practicable in such a small group, ensure diversity in gender, ethnic origin, and geographical area of residence. The term "non-lawyer" would exclude members of the Law Society of Alberta; persons with law degrees who engage in legal work, whether as judges, academics, employees or practitioners; and retired lawyers and judges.

A possible objection to the proposal that the Minister appoint four members of the PCNC is that a Minister might try to control the PCNC by appointing non-lawyer members who have a certain ideological bent or who are associated with the governing political party. The Committee does not think that this would be likely, if for no other reason than that the Minister would have no control over the choice

of judicial and legal members of the PCNC, and these would be enough to counteract any effort to impose a political agenda upon it.

Finally, one objection to nominating committee systems should be dealt with. That objection is that moving the principal responsibility for appointments from the Executive to a nominating body will simply change the forum in which political activity will be carried on, that is, that the favour of members of the nominating body will be sought instead of the favour of Ministers (though, it will be noted, the Minister will still have the final say, within the boundaries of the short list). In the Committee's opinion, although some "political" activity may take place, the number and diversity of members of the PCNC will make any form of lobbying or cronyism difficult and will minimize such activities.

The Committee proposes that the PCNC consist of eight members, as follows:

1. The Chief Justice of the Court of Queen's Bench of Alberta or his or her designate;
2. The Chief Judge of the Provincial Court or his or her designate;
3. The President of the Provincial Court Judges Association or his or her designate;
4. The President of the Law Society of Alberta or his or her designate;
5. Four members who are not lawyers, appointed by the Minister of Justice, chosen so as to best achieve gender, ethnic and geographical diversity.

It will be seen that the judicial and legal members will be able to designate substitutes either for all meetings of the PCNC or for meetings which those members will not be able to attend. In order to maintain the appropriate balance between the judiciary/bar and non-lawyer members at meetings, the Committee thinks that the Minister should be authorized to appoint two alternate non-lawyer members who would be able to attend when any of the non-lawyer members is not present.

In the Committee's opinion, a Provincial Court Nominating Committee so composed will ensure that the choice of Provincial Court judges will appropriately reflect the composite views of the judiciary, the legal profession and the public of the province, and will give the public sufficient assurance that that is the case.

Recommendation 5

The Committee recommends

(1) That the nominating body (which is referred to for convenience as the "Provincial Court Nominating Committee" or "PCNC") should be composed of the following members:

1. The Chief Justice of the Court of Queen's Bench of Alberta or his or her designate;

2. The Chief Judge of the Provincial Court or his or her designate;

3. The President of the Provincial Court Judges Association or his or her designate;

4. The President of the Law Society of Alberta or his or her designate;

5. Four members who are not lawyers, appointed by the Minister of Justice, chosen so as to best achieve gender, ethnic and geographical diversity. The Minister should also be authorized to appoint two alternate members to attend and participate in proceedings of the PCNC in substitution for any of the four members who are unable to attend.

(2) That the PCNC be at liberty to make its own rules of procedure and designate one of its members as chair.

7.2 Term of appointment of non-lawyer members of the PCNC

The Committee thinks that non-lawyer members of the Provincial Court Nominating Committee, including alternates, should be appointed for three-year terms, with the possibility of one renewal. It should be possible to appoint as a full member of the PCNC an individual who has served a term as an alternate member, but the total time served by any individual should not exceed two terms, that is, six years. It should be possible to stagger appointments so as to provide continuity.

Recommendation 6

The Committee recommends

(1) That the four non-lawyer members and two alternate members of the PCNC be appointed by the Minister for three year terms, with power to appoint members for shorter terms in order to maintain continuity.

(2) That an individual who has served a term as an alternate member be eligible for appointment as a full member.

(3) That the total time for which any person may be appointed to serve as full or alternate member or both be two terms, or six years.

7.3 PCNC proceedings

In Recommendation 3, the Committee has spelled out in general terms procedures which the Provincial Court Nominating Committee should be required to follow. Within the parameters of Recommendation 3, the PCNC should be left to decide how to carry out its mandate. However, in this section of the Report, the Committee will make some general comments about the way in which the PCNC may be expected to perform its role.

The objective of the advertising required by Recommendation 3 is to make a prospective appointment public so that it will be brought to the attention of most persons who are qualified to apply. Whether an appointment should be advertised outside Alberta would be a question for the PCNC. Whether, in addition to general advertisements, other steps should be taken to encourage applications or to inform prospective applicants would also be questions for the PCNC.

The Committee will recommend in the next section of this Report that some criteria for appointment be laid down by law and that the PCNC be left free to flesh out those criteria by adding to them or by adopting more specific criteria. The Committee thinks that all criteria adopted by the PCNC should be included in the advertisements.

The information to be obtained from applicants should be extensive and should include everything that relates to the suitability of applicants for judicial appointment. Extensive information is required under the present selection system. It would be for the PCNC to determine whether that information is adequate for the purposes of the judicial selection process or whether anything further should be required.

The Judicial Council now checks applicants for criminal records, disciplinary sanctions imposed by the Law Society, and civil judgments for substandard legal service. It would be expected that the PCNC would continue these practices, though that would be a question for the PCNC to determine. Whether steps should be taken to check an applicant's reputation other than by consulting the referees whose names are supplied by the applicant would also be for the PCNC to determine. Difficult questions of confidentiality can arise, as the disclosure that an individual has applied for appointment might adversely affect the applicant's career if they are not appointed, and these will also be for the PCNC to determine, having due regard both to the need for any investigation which circumstances may suggest and to the need for confidentiality.

The preparation of the short list of names for submission to the Minister will obviously be a complex and difficult job. Within the general parameters laid down by law, it will be for the PCNC to decide how to go about preparing the list.

8. Criteria for Appointment of Judges of the Provincial Court

8.1 Appointment of non-lawyers

The issue of lay appointments to the Provincial Court is specifically referred to the Committee by its Terms of Reference.

In the early days of the Province and its predecessor, the Northwest Territories, it was common to appoint magistrates who were not qualified lawyers. That policy had changed by 1973. In that year, the Kirby Board of Review said that it was "established policy" to appoint to the Provincial Court only persons with a degree in law from a recognized university, who had had extensive recent trial experience, and who enjoyed the respect of the bar and bench. Since that time, no non-lawyers have been appointed to the Provincial Court and it is the policy of the Judicial Council not to recommend non-lawyers for appointment. Non-lawyer judges appointed before 1973 have continued to serve. There is at present one non-lawyer judge.

The Committee's opinion is that judges of the Provincial Court should be required to have legal training, that is, that non-lawyers should not be appointed. Its reasons are as follows:

1. Society has become complex. Consequently, the laws which regulate the relationships of governments, corporations and individuals have also become complex. The existence of the Charter is only one example, though it is the most obvious.
2. The Provincial Court's jurisdiction extends to very serious criminal charges, to important questions of family law, and to civil disputes up to $7500 which can involve complex questions.
3. A Provincial Court judge therefore requires an understanding of law, an understanding of legal process including the rules of evidence, and an understanding of the nature of the judicial function. Formal legal training and legal experience are a minimum basis for an expectation that a prospective appointee as a Provincial Court judge has these qualities.

The Committee does not say that a person without formal legal training and experience cannot achieve the necessary judicial qualities. What it does say is that making judicial appointments without the minimum assurance given by legal training and experience is too dangerous from the point of view of the public whose interests will be affected. The Committee will therefore recommend that only persons with formal legal training and experience be appointed as Provincial Court judges.

8.2 Requirement of legal training and experience

The next question is what formal legal training and experience should be required before a person can be considered for appointment to the Provincial Court.

Statutory requirements vary across the country. Alberta has no statutory requirement of legal experience, though the Judicial Council requires 10 years at the bar, subject to occasional minor relaxation. British Columbia, Manitoba, and Nova Scotia and Quebec require membership in their own bar for a specified time. New Brunswick, Newfoundland, Ontario and the two Territories accept membership in another provincial or territorial bar for a specified time, and Newfoundland and Prince Edward Island do the same but require present membership in their own bar. Federal judicial appointments can be made on the basis of membership in any provincial or territorial bar. Ontario, Yukon, and the federal legislation specifically include judicial experience.

The required amount of experience also varies across the country. The shortest is the three years' membership of a bar required by the Northwest Territories. Manitoba, Nova Scotia, Prince Edward Island and Yukon require five years. Ontario, New Brunswick, Newfoundland, Quebec and the federal legislation require 10 years, which is the requirement of the Alberta Judicial Council.

British Columbia, Manitoba and Yukon provide an escape hatch: experience other than that specified in the statute may be accepted if it is "equivalent" to the specified experience (Manitoba), or if it is "satisfactory" to the judicial council (British Columbia and Yukon).

The objective is to ensure that Provincial Court judges have an understanding of law, an understanding of legal process including the rules of evidence, and an understanding of the nature of the judicial function. In order to achieve this objective, the Committee thinks that the minimum legal requirement for appointment as a Provincial Court judge should be 10 years' memberships in good standing of the bar of a province, with credit for time spent as a full-time judge.

The Committee's reasons are as follows:

1. The Committee thinks that legal experience anywhere in Canada is a sufficient minimum qualification. The legal system is very similar from province to province. Criminal law, constitutional law and other federal law are common to the whole country. Procedural law and provincial statutory law do vary, but the differences are not too great to make it impossible for a lawyer from outside the province to master the Alberta versions in a timely fashion.
2. The Committee thinks that legal experience outside Canada is not a sufficient minimum qualification, as other legal systems are different and, in particular, legal training and experience outside Canada will not give a lawyer a sufficient understanding of Canadian criminal and constitutional law.
3. While any time requirement is necessarily somewhat arbitrary, the Committee thinks that it should be long enough to give an assurance that a candidate has achieved the necessary understanding of law, procedure and the judicial

function. The Committee thinks that the shorter periods required in some of the provinces and territories are not enough to give that assurance, and recommends that 10 years of legal experience in Canada be required.

In making this recommendation, the Committee is conscious of the proposal made by the Indigenous Bar Association that the 10-year requirement be reduced to five to seven years in the case of individuals who were mature individuals before becoming lawyers, which is often true of Aboriginal lawyers. However, it is the Committee's view that, as increasing numbers of Aboriginal lawyers reach the 10-year stage, greater attention to diversity in appointments will result in their greater representation on the Provincial Court, and that a long-term reduction in experience is not necessary for this purpose.

At this stage of this Report, the Committee is making a recommendation only for the minimum legal qualification for appointment to the Provincial Court. In specific cases, it will be for the Provincial Court Nominating Committee to evaluate the quality of the legal experience of specific candidates for appointment, which will be a significant factor in selecting the best applicants for the short list.

8.3 Age

At present, the Judicial Council will not, with some minor exceptions, approve applicants for appointment to the Provincial Court who have not reached 40 years of age. The Committee has considered whether the Provincial Court Act should specify a minimum age for appointment. It has been advised that discrimination on grounds of age might be a problem under the Charter. The Committee is of the opinion that the requirements of legal training and experience which it has recommended will give sufficient minimum assurances of judicial capabilities. It will therefore recommend that no minimum age limit be prescribed.

8.4 Other required qualifications

Requirements of legal training and experience are a means to an end, which is the selection of judges of integrity, judicial ability, community awareness, and of good personal character. However, no specific legal requirement is sufficient in itself to achieve that end.

The Committee thinks that the Provincial Court Judges Act should make a general statement about the basis on which appointments to the Provincial Court should be made and the qualities which appointees should have. It will of course be necessary for the Provincial Court Nominating Committee to apply that general statement and to develop its own policies and criteria, but the basic approach should be set out in law. The Committee will therefore recommend that appointments to the Provincial Court be made on the grounds of merit, including factors such as integrity, professional excellence, community awareness and

appropriate personal characteristics. The latter will allow representativeness to be considered as a factor, though not so as to detract from the overall requirement of merit.

8.5 Citizenship

Sec. 2(2) of the Provincial Court Judges Act provides that no person other than a Canadian citizen can be appointed to the Provincial Court. The Committee is advised that it is likely that this requirement can be challenged under the Charter. In order to avoid a similar challenge, the Alberta Legal Profession Act has been amended to provide for the enrolment as a lawyer of a person who "is a Canadian citizen or is lawfully admitted into Canada for permanent residence."

The Committee does not think that citizenship, as such, has any relevance to an individual's ability to function as a Provincial Court judge. The Committee thinks that the requirement of membership in the bar of a Canadian province or territory for 10 years is sufficient assurance that appointees will have an understanding of Canadian laws, procedures and judicial function. The Committee therefore does not recommend that the Provincial Court Judges Act impose any requirement of citizenship or residence.

8.6 PCNC criteria

The recommendations in this Report cover the minimum qualifications that the law should require for appointment to the Provincial Court. They also include a general statement that appointments should be made on merit, including such things as integrity, professional excellence, community awareness and good personal characteristics. The latter will allow representativeness to be considered as a factor, though not so as to detract from the overall requirement of merit. The Committee thinks that these recommendations provide an appropriate structure within which specific candidates can be considered.

However, the Committee expects that PCNC will find it necessary to refine these recommendations in order to arrive at criteria for application to specific cases and recommends that it do so. An example of such criteria, which the Committee recommends as a good starting point, is the list developed by the Ontario Judicial Appointments Advisory Committee, as follows:

"Professional excellence

- A high level of professional achievement in the area(s) of legal work in which the candidate has been engaged. Experience in the field of law relevant to the division of the Provincial Court on which the applicant wishes to serve is desirable but not essential.
- Involvement in professional activities that keep one up to date with changes in the law and in the administration of justice.

- An interest in or some aptitude for the administrative aspects of a judge's role.
- Good writing and communication skills.

Community awareness

- A commitment to public service.
- Awareness of and an interest in knowing more about the social problems that give rise to cases coming before the courts.
- Interest in methods of dispute resolution, alternatives to formal adjudication and in community resources available for participating in the disposition of cases.

Personal characteristics

- An ability to listen.
- Respect for the essential dignity of all persons regardless of their circumstances.
- Politeness and consideration for others.
- Moral courage and high ethics.
- An ability to make decisions on a timely basis.
- Patience.
- Punctuality and good regular work habits.
- A reputation for integrity and fairness.
- Compassion and empathy.
- An absence of pomposity and authoritarian tendencies.

Demographics

- The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability."[5]

[5] The Annual Report for 1996, The Judicial Appointments Advisory Committee, Ontario.

Recommendation 7

The Committee recommends

(1) That appointments to the Provincial Court be made on the grounds of merit, including factors such as integrity, professional excellence, community awareness, and appropriate personal characteristics.

(2) That representativeness of the general population be considered as a factor, though not so as to detract from the overall requirement of merit.

(3) That only persons with formal legal training and experience be appointed as Provincial Court judges.

(4) That the minimum legal requirement for appointment as a Provincial Court judge should be 10 years membership in good standing of the bar of a province or territory of Canada, with credit for time spent as a full-time judge.

(5) That no minimum age for appointment be prescribed.

(6) That no citizenship or residence requirement be prescribed.

(7) That the PCNC give consideration to formulating and issuing the criteria which it will apply in selecting names to go on its short list, the Ontario Judicial Appointments Advisory Committee's list which is reproduced in this report being, in the Committee's opinion, a good starting point.

9. Term of Judicial Appointments

9.1 General discussion

The Committee's Terms of Reference include identifying alternative mechanisms of appointment "including the possibility of non-renewable term appointments." The list of issues attached to the Terms of Reference includes the words "term appointments" without limitation to non-renewable term appointments, and some of the submissions received by the Committee favoured renewable fixed-term appointments. The Committee has considered the issue of renewable term appointments as well as the issue of non-renewable term appointments.

The Constitution Act, 1867, provides that judges of the Queen's Bench and the Court of Appeal are appointed to a retirement age of 75 years during "good behaviour," that is, they have security of tenure until they reach the age of 75 years, at which time they are compulsorily retired. The Provincial Court Judges Act provides that Provincial Court judges must retire on attaining the age of 70 years and they can be removed before that time only on a recommendation of the Judicial Council after a judicial inquiry. While the grounds for removal are not specified, this procedure effectively protects Provincial Court judges from removal before age 70 except for incapacity or impropriety. In general, judges of all superior courts and Provincial Courts in Canada are appointed with security of tenure to retirement age which varies from 65 years to 75 years.[6] Term appointments are not used in Canada or other similar jurisdictions.

The question here is whether or not fixed-term appointments, whether renewable or non-renewable, should be substituted for the existing system of appointment to retirement age.

9.2 Renewable fixed-term appointments

Renewable fixed-term appointments for Provincial Court judges would make sense only if coupled with a means of deciding which judges should be re-appointed and which judges should not. Someone would have to be given the power to decide, and an understanding would have to be reached about the grounds on which decisions would be made.

Essentially, the four submissions received by the Committee which recommend appointments for renewable fixed terms do so as a means of ensuring the "accountability" of the Provincial Court judges. One submission, for example, proposes that the review for reappointment be by a committee equally composed

[6] This does not include Provincial Court judges who are appointed to part-time or supernumerary positions after retirement, or to deputy judges in the Northwest Territories and the Yukon. Supernumerary judges will be considered later in this Report.

of members of victims' groups, the judiciary, the bar, and Alberta Justice, and it proposes that the committee consider whether personal biases or incompetence affected judgments and sentences. Another calls for term appointments coupled with a review by an independent body for honesty, integrity, and accountability, and refers to the making of ignorant remarks and laughing at disabled people. Another three submissions, with the same end of accountability in mind, propose a "review" or "recall" process which would presumably operate at any time without being attached to a system of fixed-term appointments.

The Committee, however, thinks that renewable term appointments would not be in the public interest. Its reasoning is as follows:

1. If accountability is the aim, someone with authority to decide will examine a judge's work, that is, the judge's judicial decisions, to see whether it is of satisfactory quality.
2. An assessment of judicial decisions necessarily involves deciding whether those decisions were right or wrong. Those who make the assessment, that is, the members of the reappointing authority, will inevitably apply their own standards of correctness.
3. A judge who wants to be reappointed when the time comes will be under pressure to make judicial decisions that are likely to seem right to the reappointing authority.
4. A trial that may result in a decision being made to please someone who is not present in the courtroom, has not heard the evidence and has not heard what those involved have to say is not a fair trial, and a system that encourages such decisions is an unsatisfactory system.

An additional factor is that uncertainty of reappointment is likely to mean that many good candidates will not apply for appointment.

If it is thought that there is a need for additional measures to keep Provincial Court judges in touch with social trends and values, the Committee thinks that such things as continuing education, voluntary and confidential performance evaluations and study leaves of absence might be considered.

In the Committee's opinion, however, the way to achieve the proper operation of the legal system at the Provincial Court level is, first, to get the best qualified judges, and, second, to see that elected representatives make appropriate laws. Incorrect individual judicial decisions should be left to the appeal process.

9.3 Non-renewable fixed-term appointments

Non-renewable fixed-term appointments would not make judges more "accountable," as their judicial behaviour could not either get or deny them a further term. Nor would a system of non-renewable term appointments affect judicial independence to the same extent as renewable appointments, as it would

not put pressure on judges to obtain further appointments by tailoring their decisions to the wishes of a reappointment authority.

The Committee thinks, however, that there is some risk that the Court's independence or impartiality would be compromised by a system of non-renewable fixed-term appointments. In many cases, fixed-term appointments would expire before the judge reaches normal retirement age. In such cases, the judge is likely to want employment after the end of the fixed term. The most likely sources of employment will be government, law practice and business firms. Judges nearing the end of their terms may have reason to make decisions that will be pleasing to possible future employers or clients, and even if a judge acts with integrity in such a position, there may be a perception of bias in favour of prospective employers, particularly the government, and clients. This is a concern that is often expressed, and it is expressed in submissions to the Committee. The Committee thinks that it should be taken into consideration.

An advantage of non-renewable fixed term appointments is that they will get rid of bad judges, if there are any. The corresponding disadvantage is that they will also get rid of good judges. The question is whether substituting newly-appointed judges would improve the overall composition of the Provincial Court.

Under a system of non-renewable fixed-term appointments, judges who have become jaded or subject to burnout will have to leave the Court. As against that, judges who, by reason of judicial experience, have become better judges than when they started will also have to leave.

The Committee does not see any reason, on balance, to think that a Provincial Court composed of judges with no more than 10 years' experience (if 10 years were the term chosen) and with an average of five years' experience is likely to be better than one composed of judges with a much higher average experience. Nor does there seem to the Committee to be any assurance that, on the whole, new appointees will be better judges than those whom they replace.

There is, in the Committee's opinion, a risk that a system of non-renewable fixed-term appointments would reduce the pool of well-qualified applicants. A prospective candidate would have to take into account the prospect that after the expiration of, say, a 10-year term, they would have to find new employment. At that stage, having judicial experience might be an advantage in finding employment, but at the Provincial Court level, that experience would be most likely to be of use in private criminal and civil litigation, and the ex-judge is likely to be precluded from appearing before the courts for a time at least. Of course, if a fixed term would take a judge to the verge of retirement, this would not be a problem, but the system should not encourage only candidates who are in their fifties or who are not successful in the practice of law to apply for appointment.

On balance, the Committee does not see any significant advantage in a system of non-renewable fixed-term appointments, and it sees some significant disadvantages. It therefore recommends against such a system.

9.4 Retirement age

The retirement age for Provincial Court judges is 70. Although this is earlier than the retirement age for the Queen's Bench and the Court of Appeal, which is 75, retirement age outside the judiciary is more commonly 65 or even earlier. The Committee therefore addressed itself to the question whether or not Provincial Court judges should be appointed to an earlier retirement age such as 65.

According to information supplied by Alberta Justice, as at January 1, 1998, the average age of the present Provincial Court judges at the times of their appointments was 45 years, 8 months. Assuming that this age pattern is fairly typical, the average total time of service to age 70 will be 24 or 25 years, or perhaps somewhat less due to retirements. Approximately 50 per cent of the present judges were appointed before the age of 45 and 20 per cent before the age of 40. A reduction of the retirement age to 65 years would still leave an average length of service of nearly 20 years.

The Committee has been told that such a reduction would cause a financial difficulty. Lawyers recruited at 40 or 45 years of ages are not likely to have been able to make significant provision for their retirement years and are likely to depend on the judicial pension, which is not likely to be adequate without the last five years of service.

Some members of the Committee think that there is a strong case to be made for a reduction in the retirement age. Others think that they do not have enough information to make an appropriate judgment. The division of opinion is such that the Committee does not think that it ought to make a recommendation in favour of either retaining the present retirement age or lowering it.

The Committee, however, thinks that the retirement age of Provincial Court judges is a question which should be looked into by some appropriate body, and it so recommends. The age should be reduced only if adequate provision is made for pensions of retired judges, and any such reduction should not apply to judges now sitting.

Recommendation 8

The Committee recommends

(1) Against fixed-term appointments of judges to the Provincial Court, whether renewable or non-renewable,

(2) That Provincial Court judges continue to be appointed to retirement age, and

(3) That the question of the retirement age of Provincial Court judges should be looked into by an appropriate body, though no reduction should take place unless adequate pension arrangements are made and any reduction should not apply to judges now sitting.

9.5 Terms of appointments of the Chief Judge and Assistant Chief Judges[7]

The office of the Chief Judge is important both to the independence and the efficiency of the Provincial Court. The Chief Judge:

(a) liaises with the Minister and Deputy Minister of Justice regarding political initiatives that may have an impact on the administration of justice in Alberta, especially with respect to the Provincial Court and justices of the peace and generally speaks for the Court where a public statement is necessary;

(b) is responsible for all aspects of the administration of the judicial resources of the Provincial Court, including formulating and implementing policy with respect to case management and delay reduction initiatives;

(c) is responsible for the continuing education of Provincial Court judges;

(d) recommends, where desirable, the appointment of supernumerary judges;

(e) receives complaints against Provincial Court judges and justices of the peace.. Under Alberta Bill 25 of 1998, the Chief Judge, in connection with a complaint or any matter that comes to the Chief Judge's attention, may reprimand a judge, take corrective measures, refer a complaint to the Judicial Council, or determine that no further action need be taken;

(f) serves as a member of the Judicial Council;

(g) is responsible for the supervision of, and the assignment of duties to, justices of the peace.

The Assistant Chief Judges, under delegation from the Chief Judge, are generally responsible for the administration of their divisions of the Provincial Court or the areas for which they are appointed. This includes:

(a) assignment of judicial duties and scheduling of vacations;

(b) organization of procedures with a view to minimizing inconvenience to the public and maximizing use of Court and judicial time;

(c) monitoring Court facilities and advising the Chief Judge when improvements are required;

(d) dealing with minor complaints about judicial conduct and bringing substantial complaints to the attention of the Chief Judge.

Under sec. 2(3) of the Provincial Court Judges Act, the Lieutenant Governor in Council "shall" designate one judge to be Chief Judge of the Court and "may" designate a deputy chief judge (something that has not been done). In addition, the Lieutenant Governor in Council "may" designate Assistant Chief Judges, of which there are nine. While the Act does not say so, appointments of the Chief

[7] Chief Judge Wacowich abstained from voting on the term of appointment of a Chief Judge.

Judge and Assistant Chief Judges are generally considered to be appointments to retirement age, although there is one Assistant Chief Judge who, according to the Order in Council appointing him, is appointed to that office for a 10-year term.

Practices vary with respect to Provincial Courts in other provinces. In Ontario and Quebec, for example, Chief Judges and Associate Chief Judges are appointed for non-renewable fixed terms of six and eight years respectively, though in Ontario the Chief Judge will continue in office for a ninth year if a successor has not been appointed. In New Brunswick, to take a different example, the Chief Judge is appointed for a 10-year term which is stated to be renewable. Newfoundland and Saskatchewan provide for fixed-term appointments which are not stated to be non-renewable and are therefore presumably renewable. In other provinces, the appointments are not limited and accordingly go to retirement age.

The questions here are whether the Chief Judge and Assistant Chief Judges should be appointed for fixed terms and, if so, whether the fixed terms should be renewable or non-renewable.

The Committee does not think that renewable fixed-term appointments should be adopted. A Chief Judge or Assistant Chief Judge who is dependent on the Lieutenant Governor in Council for reappointment is not independent of the Executive and is likely to feel pressure to do what will please the Executive. As the Chief Judge, and to a lesser extent the Assistant Chief Judges, speak for the Court in many respects, their dependence on the Executive for reappointment is a serious derogation from the Court's independence. Even if the Provincial Court Nominating Committee process recommended by this Committee were adopted for reappointment of Chief Judges and Assistant Chief Judges, this Committee thinks that there would be an undesirable interference with the Court's independence.

On the other hand, the Committee does not see a similar objection to non-renewable fixed-term appointments for the Chief Judge and Assistant Chief Judges. At the end of a non-renewable fixed term, a Chief Judge or Assistant Chief Judge would continue as a judge of the Court. There would be no prospect of reappointment or possible need to find other employment which would exert pressure on the Chief Judge or Assistant Chief Judge.

The Committee sees some positive advantages to non-renewable fixed terms. A Chief Judge or Assistant Chief Judge who is in office for a long period of time may come to dominate the Court or one branch of it. Alternation in office may tend towards an atmosphere that is less hierarchical and more collegial and may avoid administrative burnout. The Committee has not seen any evidence that these problems have in fact occurred, but it thinks that fixed-term appointments would help to guard against them in the future. It accordingly recommends that the Chief Judge and the Assistant Chief Judges be appointed for non-renewable fixed terms. It notes that such a proposal would be acceptable to the judges of the Court, speaking through the Association of Provincial Court Judges.

There is a further question: if there are to be fixed-term appointments, what should the length of the fixed terms be? The length should be chosen with an eye to the desirability of experience and continuity, on the one hand, and the desirability of change at appropriate intervals, on the other. The choice must of necessity be somewhat arbitrary.

The Association of Provincial Court Judges recommends non-renewable fixed terms of five to seven years. The Committee thinks that a seven-year term would be more suitable for the Chief Judge so that the benefits of accumulated experience will be realized. The Committee thinks that the shorter period of five years would be suitable for Assistant Chief Judges.

One question that should be addressed is: what should be the salary of a Chief Judge or Assistant Chief Judge whose term of office has expired and who has returned to sitting as a "line" judge? The Committee has addressed this question and has tentative views in favour of a provision that the judge's salary should not be less than the salary they received as Chief Judge or Assistant Chief Judge. However, the Committee thinks that this is a question for the Compensation Commission established under Alberta Bill 25 of 1998.

Recommendation 9

The Committee recommends

(1) That the Chief Judge and the Assistant Chief Judges be appointed to those offices for fixed terms;

(2) That the fixed terms be seven years for the Chief Judge and five years for Assistant Chief Judges;

(3) That the appointments be non-renewable;

(4) That upon the expiration of a fixed term, a retiring Chief Judge or Assistant Chief Judge should continue to be a judge of the Provincial Court;

(5) That the question whether a former Chief Judge or Assistant Chief Judge should receive a sitting judge's salary or a salary associated with their former office should be referred to the Compensation Commission established under Alberta Bill 25 of 1998.

9.6 Supernumerary judges

Up to this point, the Committee has discussed appointments of regular full-time judges to the Provincial Court. However, the Provincial Court Judges Act also provides for the appointment of what are called "supernumerary" judges. Before the enactment of Alberta Bill 25 of 1998, a supernumerary judge had to be a retired judge of the Provincial Court who had served for at least 10 years and was at least 60 years of age. Bill 25 has removed the time of service and age requirements, so that any retired Provincial Court judge can elect to be eligible for appointment as a supernumerary. Supernumerary judges are paid for every day or

half day of judicial service at a rate which, if they worked full-time, would give them approximately the salary of a regular judge but without pension benefits. They work only when called upon by the Chief Judge.

Appointments of supernumerary judges are for two year terms. Before the enactment of Bill 25 it was for the Lieutenant Governor in Council to decide whether to appoint a supernumerary judge in the first instance and whether or not to reappoint the supernumerary judge to further two-year terms. The Committee's opinion is that this arrangement was not satisfactory as it left supernumerary judges dependent upon the good will of the Executive for reappointment.

Bill 25 has substituted a different scheme. It says that the Lieutenant Governor in Council may appoint a supernumerary judge on the recommendation of the Chief Judge. That is, the Lieutenant Governor in Council has a discretion to reject the Chief Judge's recommendation and refuse to make the initial appointment. However, Bill 25 goes on to say that the Lieutenant Governor in Council shall renew the appointment for further two-year terms if the Chief Judge so recommends.

The Committee has earlier in this Report recommended against renewable fixed-term appointments for regular judges of the Provincial Court in order to ensure that Provincial Court judges do not tailor their decisions to obtain reappointment. Supernumerary judges could be subject to some of the same pressure. However, a retired judge who works on a part-time basis as called upon by the Chief Judge does not have as much to lose as a regular judge whose whole professional future would be at stake at reappointment time. Further, it is effectively the Chief Judge who will determine whether a supernumerary judge is reappointed to a second or later fixed term, and the Committee does not think the power will be exercised improperly. Finally, regular judges are the fundamental core of the Court and give the Court its institutional character. Supernumerary judges, on the other hand, are a part-time judicial resource to be called upon when required to supplement the regular judges, that is, they are somewhat peripheral to the main functions of the court. For all these reasons, the Committee thinks that the two-year renewable fixed-term appointments of supernumerary judges under Bill 25 are appropriate.

Recommendation 10

The Committee recommends that supernumerary judges be appointed for two-year fixed terms renewable on the recommendation of the Chief Judge as set out in Alberta Bill 25 of 1998.

10. Effect of the Charter and the Constitution

In any restructuring of the Provincial Court, the effect of the Canadian Charter of Rights and Freedoms has to be borne in mind. Sec. 11(d) of the Charter reads as follows:

> "11. Any person charged with an offence has the right . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."
>
> Sec. 11(d) applies only where a person is "charged with an offence." It applies to the work of the Criminal Division and to the criminal law work of the Youth Division. It does not apply to the work of the Civil Division and Family Divisions. However, it would not make sense to apply one set of appointment criteria to the Provincial Court where sec. 11(d) applies and another set when sec. 11(d) does not apply.

In addition, a majority of the Supreme Court of Canada has recently said[8] that the independence of the Provincial Court is entitled to much the same constitutional protection as the independence of the Queen's Bench and the Court of Appeal.

Under decisions of the Supreme Court of Canada,[9] "judicial independence" includes three elements. The first is security of tenure, that is, an assurance that judges can be removed only for cause related to the capacity to perform the judicial function and after a judicial inquiry. The second is financial security, that is, an assurance against executive interference with a right to salary in such a manner as to affect the independence of the individual judge. The third is administrative independence, that is, control of the courts over administrative decisions that bear directly and immediately on the exercise of the judicial function.

The Committee has obtained independent legal advice on a number of questions arising from the Charter and the Constitution. That advice is to the effect that none of the recommendations which the Committee makes in this Report should cause any constitutional problems. However, some of the proposals under

---

[8] See the Provincial Court Judges Reference, which is indexed for law report purposes as R. v. Campbell [1997] 10 WWR 417,

[9] See, for example, the Provincial Court Judges Reference referred to in Footnote 6 at pages 479-481. There are complexities in the concept that are not necessary for the discussion in this Report, which give the essentials only.

consideration, which the Committee has decided against for other reasons, could cause constitutional problems.

For example, the Committee's legal advice is that:

(1) Non-renewable fixed-term appointments of regular Provincial Court judges would not offend against sec. 11(d) or the Constitution, if accompanied by a prohibition against appointment of a judge, on the expiration of his or her fixed term, to any other position in the public service. However, the Committee's legal advice is, that even with that prohibition, if such a scheme were adopted contrary to the Committee's recommendation, it should be the subject of a court reference to determine its validity under the Constitution Act, 1867, as the ramifications of the Supreme Court of Canada's recent statements in the Provincial Court Judges Reference about the independence of the Provincial Court have not been worked out.

(2) Renewable fixed-term appointments would offend against sec. 11(d) if the reappointment is subject to Executive discretion or if an assessment of the judicial decisions of judges will be the grounds for granting or refusing reappointment. That is because a system of renewable fixed-term appointments would put pressure on judges to make decisions which would please the reappointing authority.

(3) The election of judges would offend against sec. 11(d). That is because judges would be under pressure to make decisions which would get votes. In view of sec. 11 (d) and provisions in state constitutions in the United States which provide for the election of judges, the constitutional position in Canada with respect to the election of judges is different from the constitutional position in the United States.

(4) Non-renewable fixed terms for the Chief Judge and Associate Chief Judges would not cause constitutional problems. Renewable fixed terms might be held to offend against either sec. 11(d) of the Charter or the Constitution Act, 1867.

11. Conclusion

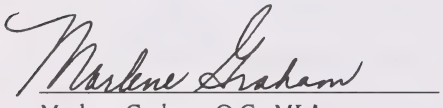
The recommendations made by the Committee in this Report reflect a consensus reached by the members of the Committee after full discussion and respectful consideration of each other's views, and the views put forward by those who made submissions to the Committee, and after consideration of the available literature on judicial appointments processes.

The Committee's recommendations reflect the Committee's overall conclusion that the judicial selection process for the Provincial Court has served the province well in the past but is in need of important evolutionary changes to meet the societal needs and expectations of the present day. One of the necessary changes is greater openness in the process. A second is involvement of representatives of the public in the process. A third is a greater assurance that judicial appointments will be made solely on the grounds of merit, that is, that the purpose of the selection process is to appoint individuals who will do the best possible job as judges.

The Committee recognizes that there are differences of opinion about the relative weights that should be given to judicial independence and judicial accountability. The Committee's consensus is that the essential interest of everyone who is affected by decisions of the Provincial Court is to have judges who are impartial and who, because they are not subject to outside influences, are seen to be impartial. The Committee therefore does not think that the judicial selection process should be used to give any outside group effective control over what judges decide. Judicial conduct which is not up to judicial standards should continue to be dealt with by a discipline process such as that which is now in place. The important thing is to get the right appointees in the first place.

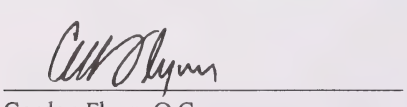
The Committee puts this Report forward in the hope that it will lead to the best possible judicial appointments and will serve to increase the confidence of the public of Alberta in the independence and impartiality of the judges of the Provincial Court.

Dated at Edmonton, Alberta, this 27th day of May, 1998.

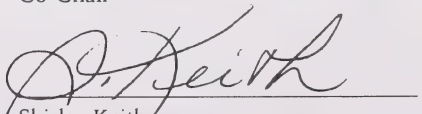


Marlene Graham, Q.C., MLA
Co-Chair

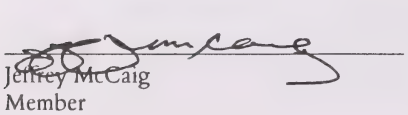
Chief Judge Edward R. Wachowich
Co-Chair



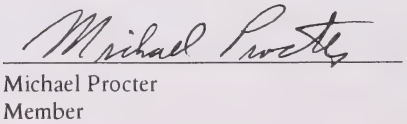
Gordon Flynn, Q.C.
Member



Shirley Keith
Member



Jeffrey McCaig
Member



Michael Procter
Member

APPENDIX A: MINISTERIAL ORDER

ALBERTA
MINISTER OF JUSTICE

5/98

MINISTERIAL ORDER

I, **JONATHAN N. HAVELOCK, Q.C.**, Minister of Justice and Attorney General for the Province of Alberta, pursuant to section 7 of the Government Organization Act hereby make the order in the attached appendix being the appointments of the Judicial Selection Process Review Committee.

Dated at the City of Edmonton, in the Province of Alberta, this 21st day of January, 1998

MINISTER OF JUSTICE AND ATTORNEY GENERAL
OF THE PROVINCE OF ALBERTA

APPENDIX

1. The Honourable Edward Wachowich is hereby appointed as co-chair of the Judicial Selection Process Review Committee for a term to expire on May 31, 1998.

2. Marlene Graham, MLA is hereby appointed as co-chair of the Judicial Selection Process Review Committee for a term to expire on May 31, 1998.

3. Gordon Flynn, Q.C., Shirley Keith, Jeffrey McCaig and Michael Procter are hereby appointed as members of the Judicial Selection Process Review Committee for terms to expire on May 31, 1998.

4. The co-chairs and members shall receive expenses in accordance with the Government of Alberta Subsistence and Travel Expense Regulations.

APPENDIX B: TERMS OF REFERENCE

The terms of reference of the committee will include:

- Documenting, reviewing and evaluating all aspects of the current appointment process for Provincial Court Judges.
- Identifying alternative mechanisms that could be used for the appointment of Provincial Court Judges, including the possibility of non-renewable term appointments.
- Considering whether the Chief Judge and Assistant Chief Judges should be appointed for a term rather than until age 70.
- Considering all legal arguments and constitutional implications regarding judicial independence as it relates to the appointment of Provincial Court Judges.
- Reviewing the role of the Judicial Council.

APPENDIX C: NEWSPAPER ADVERTISEMENT

ALBERTA

CALL FOR SUBMISSIONS TO THE JUDICIAL SELECTION PROCESS REVIEW COMMITTEE

On December 2, 1997, Alberta Justice Minister Jon Havelock established a Committee to review how Provincial Court Judges are appointed.

The Judicial Selection Process Review Committee will:

- evaluate all aspects of the current appointment process.
- identify alternative mechanisms that could be used for appointments.
- consider whether the Chief Judge and Assistant Chief Judges should be appointed for a term rather than until age 70.
- consider all legal arguments and constitutional implications regarding judicial independence as it relates to the appointment of Provincial Court Judges.
- review the role of the Judicial Council.

The Committee is inviting written submissions on any of the above matters. Please write to:

The Judicial Selection Process Review Committee
c/o Marlene Graham, Q.C., MLA
Co-Chair
634 Legislature Annex
9718 - 107 Street
Edmonton, Alberta
T5K 1E4

Submissions should include your name and mailing address. Please summarize your submission if it is over one page in length. The deadline is March 31, 1998. The Committee will report to the Minister of Justice by the end of May 1998.

For further information contact Ken Kereliuk at Alberta Justice: 427-4992.
To be connected toll free dial 310-0000 and ask for 427-4992.

APPENDIX D: ORGANIZATIONS THAT MADE SUBMISSIONS

Alberta Association of Chiefs of Police

Alberta Association of Municipal Districts & Counties (AAMD&C)

Alberta Civil Trial Lawyers Association

Alberta Crown Attorneys' Association

Alberta Government Civil Lawyers Association

Alberta Law Reform Institute

Alberta Provincial Judges' Association

Anderson Dawson Knisely & Stevens

Association des juristes d'expression française de l'Alberta

Calgary Immigrant Aid Society

Canadian Bar Association, Alberta Branch

Canadian Grandparents' Rights Association

Canadians Against Violence Everywhere Advocating its Termination (CAVEAT) Alberta

Catholic Social Services

Citizens Legal Reform Society

Coalition for Legal Reform, The Independent Lawyers Society of Alberta

Cochrane Foothills Protective Association

Confederation of Regions Political Party

Criminal Trial Lawyers Association

Edmonton Bar Association

Edmonton Grove of the Church of Reformed Druids and University of the Universe

Edmonton John Howard Society

Edmonton Police Service

Equitable Child Maintenance & Access Society

Hobbema Police Service

Indigenous Bar Association in Canada

Karras Rathbone Harvie

Law Society of Alberta

Legal Aid Society of Alberta

Legal Education Society of Alberta

Medicine Hat/Brooks Bar Association

Medicine Hat Police Service

Moe & Hannah

Mothers Against Drunk Driving (MADD), Red Deer & District Chapter

People Against Impaired Driving (PAID) / Research & Education on Impaired Driving (REID)

RCMP "K" Division

Real Women of Canada

University of Alberta, Faculty of Law

University of Calgary, Faculty of Law

West Yellowhead Bar Association

Alberta
JUSTICE